

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

YEVGENIA¹ SUD : CIVIL ACTION
: :
: :
v. : NO: 05-2582
: :
: :

JO ANNE B. BARNHART,
Commissioner of Social Security

MEMORANDUM AND ORDER

AND NOW, this 6th day of April, 2006, upon consideration of the cross-motions for summary judgment (Doc. Nos. 5 and 6), and the reply brief thereto (Doc. No. 7), the Court makes the following findings and conclusions:

A. On June 5, 2001, Yevgeniya Sud (“Sud”) applied for supplemental security income (“SSI”) under Title XVI of the Social Security Act (“Act”), 42 U.S.C. §§ 1381-1383f. (Tr. 65-70). Throughout the administrative process including an August 28, 2001, hearing before an administrative law judge (“ALJ”), Sud’s claim was denied. (Tr. 4-6; 8-16; 18-44; 45-50). Sud then sought judicial review in this Court. During the pendency of the appeal, Sud filed a subsequent application for SSI, upon which Sud was successful in obtaining benefits from January 1, 2003, onward. The instant case was remanded for further review of the closed period from May 1, 2001, through December 31, 2002. (Tr. 335-342; Pl’s. Br. at Ex. A). After a February 17, 2005, supplemental hearing, the ALJ issued a second decision on March 21, 2005, denying Sud’s claim during the relevant period. (Tr. 240-247; 259-300). After the Appeals Council denied Sud’s request for review of the ALJ’s March, 21, 2005, decision, Sud appealed to this Court pursuant to 42 U.S.C. § 405(g).

B. The ALJ found Sud’s cervical radiculopathy and depressive disorder to be severe. (Tr. 242 ¶¶ 7-8; 247 Finding No. 2), but found that they were not severe enough to meet or medically equal any of the listed impairments. (Tr. 242 ¶ 9; 247 Finding No. 3); 20 C.F.R. Appendix 1 to Subpart P of Part 404. The ALJ further concluded that between May 1, 2001, through December 31, 2002, Sud was able to perform her past relevant work as she performed it, was not disabled, and had the residual functional capacity (“RFC”) to perform sedentary work with some restrictions. (Tr. 244 ¶ 20; 246 ¶¶ 27-28; 247 Finding Nos. 5, 8, 9).

¹ Although captioned as Yevgenia, it appears from the record that the proper spelling of claimant’s first name is Yevgeniya.

C. The Court has plenary review of legal issues, but reviews the ALJ's factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm'r of Soc. Sec., 181 F.3d 429, 431 (3d Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 F.2d 1211, 1213 (3d Cir. 1988). If the ALJ's conclusion is supported by substantial evidence, this Court may not set aside the Commissioner's decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

D. Sud raises several arguments that the ALJ's determination was legally and factually erroneous. However, this Court finds that there is no legal error in the ALJ's decision and that there is substantial evidence in the record to support the conclusions of the ALJ.

1. Sud argues that the ALJ should have considered her ability to communicate in English when evaluating her RFC. However, ability to communicate in English is one of several categories upon which a person's education is evaluated and vocational factors such as education will not normally be considered until step five. 20 C.F.R. §§ 416.960(c); 416.964(b). Here, failure to consider Sud's ability to speak English is not improper because the ALJ did not proceed past step four of the disability proceeding.² Garcia v. Sec. of Health and Human Servs., 46 F.3d 552 (6th Cir. 1995) (inability to speak English did not have to be considered when examining past relevant work); Mena v. Apfel, No. 98-55909, 2000 U.S. App. LEXIS 3275, at * 6 n.3 (9th Cir. Mar. 1, 2000).

2. Secondly, Sud argues that the medical expert ("ME"), Dr. Saul, used an inappropriate standard to examine all the treating expert sources. Specifically, Sud argues that it was inappropriate for the ALJ to adopt the ME's opinion as controlling, since he inappropriately reinterpreted the treatment documents as endorsing a much less restrictive RFC than the treating physicians themselves. Furthermore, Sud argues that non-examining and non-treating physicians are the lowest rung of the hierarchy of doctors. Although it is true that treating physicians are generally given more weight, an ALJ is not forbidden from relying on the opinion of a non-treating physician. 20 C.F.R. § 416.927(d). It is acceptable for ALJ to rely on a non-treating ME's RFC assessment so long as the RFC is not contradicted by the other evidence of record, is consistent with other evidence, and is not the only piece of evidence upon which the ALJ relies. Catalano v. Barnhart, No. 04-2649, 2005 U.S. Dist. LEXIS 9397, at *19 (N.D. Cal. May 4, 2005); see also Moody v. Barnhart, 114 Fed. Appx. 495, 501 (3d Cir. 2004); 20 C.F.R. § 416.927(f). Here, the ALJ has followed this directive. Contrary to Sud's assertion, Dr. Saul did

² Frontanzez-Rubiani v. Barnhart, upon which Sud relies, is therefore distinguishable as the claimant in that case, unlike here, had no prior relevant work experience. No. 03-1514, 2004 WL 2399821, at * 4-5 (E.D. Pa. Sept. 30, 2004).

not reinterpret the treatment documents as endorsing a much less restrictive RFC, but endorses an RFC which is, not contradicted, is consistent with the physicians of record upon whom the ALJ relies, and is not alone the basis for the ALJ's decision. In her decision, the ALJ credits Drs. Elinow and Berenson to the extent that their opinions are consistent with Dr. Kramer. (Tr. 245 ¶ 23; 246 ¶ 24; 217-219; 162-167; 196-202). Most notably Dr. Kramer opined that Sud was seriously limited³ in her ability to function independently and maintain attention and concentration. (Tr. 218). These notations are consistent with Drs. Elinow and Berenson who opined that Sud's ability to function was fair⁴ (Tr. 164) and seriously limited (Tr. 201) respectively, and consistent with Dr. Berenson's opinion that Sud's ability to maintain attention and concentration was seriously limited.⁵ These opinions are consistent with Dr. Saul's opinion that Sud could sustain work activity for a 40 hour work week. (Tr. 244-245 ¶ 21). Finally, since the ALJ's reliance is not solely based upon the opinion of Dr. Saul, but rests on the joint opinions of Drs. Saul, Kramer, Elinow and Berenson, the ALJ's reliance upon the ME was proper.

3. Next, Sud argues that Dr. Saul did not apply the proper stress standard in assessing her RFC. Sud argues that Dr. Saul was dealing with the objective stress of the job, and omitting the subjective characteristics of stress recognized in Social Security Ruling ("SSR") 85-15. As the government points out, SSR 85-15 applies only at step 5 and pertains to a claimant's ability to do other work. On a related note, Sud argues that the ALJ did not address Sud's inability to deal with work stress in his hypothetical. Generally, a hypothetical question must reflect *all* of a claimant's impairments that are supported by the record; otherwise the question is deficient and the VE's answer to it cannot be considered substantial evidence. Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987). However, it is clear that the ALJ's questioning of the VE adequately covered both objective and subjective stress in the workplace. (Tr. 287-278; see also Dr. Saul's discussion of stress, 277-278; 283). Finally, Sud's stress was accommodated in the ALJ's RFC assessment, and therefore there is no error. (Tr. 244 ¶ 20; 247 Finding No. 5).

4. Fourth, Sud argues that ME's testimony improperly suggests that Sud does not meet Listing 12.04 because she is neither psychotic nor has she been institutionalized. However, I agree with the Commissioner's explanation for these comments, which is that Dr. Saul is

³ "Seriously limited" is defined as: "Significant limitation in sustaining and/or repeating functioning in this area (inability fifty percent of the time)." (Tr. 217).

⁴ Although Dr. Elinow's RFC checklist does not define "fair," in this context, it has been defined as "capable of performing the activity satisfactorily some of the time." Parsons v. Barnhart, 101 Fed. Appx. 868, 869 (3d Cir. 2004). Furthermore, "fair" generally shares the same spot as "seriously limited" and "moderate" on RFC determination checklists and Dr. Saul specifically defined moderate to mean, "seriously limited but not precluded." (Tr. 279).

⁵ Dr. Elinow checked that Sud's ability to maintain attention and concentration was "poor/none," however, this portion of his opinion is not entitled to the substantial weight as it is inconsistent with the opinion of Dr. Kramer and as stated supra, only those portions of Dr. Elinow's opinion that are consistent with Dr. Kramer were given credit by the ALJ.

merely noting the absence of psychosis or institutionalization to counter Sud's assertion that she is so disabled that she has to be led around the house by the hand by her husband. (Tr. 276).

5. Next, Sud argues that Dr. Saul's personal distaste for GAF scores does not comport with psychiatrically accepted techniques. Sud's argument stems from the fact that the record contains at least two GAF scores which denote an inability to keep a job including the PATH report signed by Dr. Kramer which assesses Sud with a 48 GAF (Tr. 190), and Dr. Elinow's assessment that Sud's GAF was between 45-50. (Tr. 164). Dr. Saul concedes that a GAF of 45-50 is not consistent with competitive work. (Tr. 278). However, I believe this remark serves to caution against over reliance on GAF scores and is not improper because Dr. Saul explained that he has "little faith" in GAF scores because they are "spot checks." (Tr. Id.). Because Dr. Saul and the ALJ were aware of and considered Sud's GAF scores, there is no error. (Tr. 243 ¶ 12).

6. Finally, Sud argues that Dr. Saul failed to support his opinions, challenging his statement that, "There is nothing in the record that says she could not sustain a task for any specific time." (Tr. 282-283). However, I agree with the Commissioner that all Dr. Sud was trying to convey was that he saw nothing in the record to support Sud's claimed limitations causing him to believe that Sud was not so impaired as to preclude all work.

Upon careful and independent consideration, the record reveals as above analyzed that the Commissioner applied the correct legal standards and that the record contains substantial evidence to support the ALJ's findings of fact and conclusions of law. Therefore, it is hereby

ORDERED that:

1. The motion for summary judgment by **YEVGENIYA SUD** is **DENIED**;
2. The motion for summary judgment by the defendant is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST YEVGENIYA SUD**; and
3. The Clerk of Court is hereby directed to mark this case closed.

LOWELL A. REED, JR., S.J.